THE DECALOGUE JOURNAL

A PUBLICATION OF THE DECALOGUE SOCIETY OF LAWYERS

Volume 10 JUNE-JULY, 1960 Number 4

A Judge's Philosophy

. . . Justice Cardozo was one of the few of our judges who, like Justice Holmes, thought it important to *have* a philosophy. In the forefront of humanity's most cherished heroes, among prophets, saints, philosophers, scientists, poets, artists and inspiring national leaders, the number of lawyers does not loom large. Mankind as a whole cannot well live by bread alone, but needs sustaining and directing vision. It is hard for lawyers, bent on the affairs of the market place, to look up and see the heavens above, or to grasp entire the scheme of things in which they move. This is especially difficult in a country or epoch which, under the leadership of captains of industry and finance, worships a narrow practicality and acts as if theory could be safely ignored, if not despised. It requires, therefore, a high order of intellectual and moral energy for one who has been immersed almost all his life in the business of the law to avow and pursue an interest in its general backgrounds and ultimate outcome, following the maxim of the old Talmudic sages that he who would deal justly with the law must contemplate the eternal issues of life and death.

The main features of Cardozo's philosophy, like those of any sound philosophy, are essentially simple, though it needs genius and energy to trace their implications and to carry them out consistently.

The first point is that law is not an isolated technique, of interest only to lawyers and to litigants, but that it is an essential part of the process of adjusting human relations in organized society.

The second point is that the law of a growing society cannot all be contained in established precedents or any written documents, important as are continuity with the past and loyalty to the recorded will of the people. In the law as a social process, the judges play a determining role, having the sovereign power of choice in their decisions. It was in this emphasis on the judicial process as selective and creative that Cardozo's thought centered.

The third point, the logical corollary to the foregoing, is that to meet his responsibility for making the law serve human needs the judge cannot rely on legal authorities alone, but must know the actual facts of the life about him, the psychologic and economic factors that determine its manifestations, and must thus keep abreast of the best available knowledge which those engaged in various social studies, researches, or investigations can supply . . .

MORRIS R. COHEN

from *AMERICAN THOUGHT*
The Free Press, Glencoe, Illinois

THE DECALOGUE JOURNAL

Published Quarterly by

THE DECALOGUE SOCIETY OF LAWYERS

180 W. Washington St. Chicago 2, Illinois

Telephone ANdover 3-6493

Volume 10 June-July, 1960 Number 4

IN THIS ISSUE

Decalogue Annual Election and Installation of Officers On June 8th

The Decalogue 1960-1961 annual election and installation of officers will be held the evening of June 8th at a dinner at 6 P.M. in the quarters of The Chicago Bar Association, 29 So. La Salle Street. The ceremonies of installation will feature a suitable program of entertainment and an address by a prominent member of the legal profession whose name will be announced shortly. Members, their wives and friends are urgently invited to attend.

An unusual feature of the election and installation evening program will be the presentation of an original musical comedy "The Court Room" written and directed by member Samuel L. Rosenblatt, and produced by a member of our Board of Managers, Marvin Juron. The entire cast of twenty-five or more participants—actors will consist of members of our Society only.

The Decalogue Society Women's Auxiliary should receive much of the credit for making possible the presentation of this play.

Past president Samuel Allen, chairman nominating committee, submitted the following nominations for election June 8th.

President .....L. Louis Karton

1st Vice President .....Bernard E. Epton

2nd Vice President .....Reginald J. Holzer

Financial Secretary .....Judge Irving Landesman

Treasurer .....Harry H. Malkin

Executive Secretary .....Michael Levin

To serve as members of the Board of Managers for a term of two years:

Zeamore A. Ader
Favil David Berns
Eugene Bernstein
David Davidson
Matilda Fenberg
Marvin Juron
Esther O. Kegan
Earle A. Malkin
Max A. Reinstein
H. Burton Schatz
Marvin M. Victor

The Editor will be glad to receive contributions of articles of modest length, from members of The Decalogue Society of Lawyers only, upon subjects of interest to the profession. Communications should be addressed to the Editor, Benjamin Weintroub, 179 West Washington Street, Chicago 2, Illinois.

In Retrospect And Looking To The Future

By MEYER WEINBERG

It is traditional for a retiring head of our Society to share with the membership reflections upon his experiences as President and in all humility point to the achievements of his administration. These remarks, however, are not intended and shall not be construed as a swan song. My interest in this organization, its welfare and progress does not and will not cease as long as I live and, incidentally, am able to pay my membership dues.

It is my belief that ours is a most worthwhile and useful organization and that its aims and purposes—those dealing with the profession and communal causes — justly entitle it to wholehearted endorsement. Such was my attitude when but a member in its ranks and, likewise, during my incumbency in office.

To begin with, in making my report, I would like to express my deep appreciation to fellow officers of our Society who, during my administration gave me their stalwart and hearty support. They were always at my side, loyal, dependable, and generous. No one man can do all the chores in connection with the presidency and, while final responsibility was always mine I gained much and learned constantly from their unconditional cooperation. They were at my side during all our functions and activities throughout the year—the Decalogue Outing Day, Toast to Bench event and our great annual Merit Award affair.

It is difficult to name particular individuals in our Society to whom I am indebted more than to others for their outstanding performance and devotion to our association. There are, I am proud to acknowledge, quite a number of such men, each entitled to commendation. It would be more fair and equitable, I believe, to name but the committees rather than persons.

I am especially grateful to the chairman of the Legal Education committee for a remarkable job well done. To the Essay Contest committee for their outstanding contribution to legal lore on a most debated problem in our generation. To the committee striving to make good the Decalogue commitment to the Hebrew University in Israel. To the chairmen of our Great Books Course project for their persistence in a great educational effort.

My thanks to the chairman of our Directory and Diary for his competent and loyal services. To the men who see through the many arduous and different tasks in connection with our Merit Award event. To members who see through to a successful conclusion

MEYER WEINBERG

our annual Outing Day event. To the stalwart editor of our Journal. Many thanks to the chairman of our Public Forum committee.

I am grateful to our membership committee for its magnificent accomplishments, and to the chairmen of the committee who saw through to a brilliant conclusion the pilgrimage to Washington, D.C. when 199 members of our Society were admitted en masse to practice law in the United States Supreme Court.

My best wishes to the Ladies Auxiliary of our Society for its growth and further usefulness to the Decalogue.

May I note also that in the last months of my administration a new project has been initiated which, together with others, I hope to help bring to a successful fruition, namely, a pilgrimage of hundreds of members of our Society to the State of Israel in 1961. There is already a widespread and keen interest in this Decalogue effort; we shall know more about details in connection with this trip in the ensuing months, a bright prospect is ahead of us, a trip to Israel.

In conclusion may I add that I am grateful to the entire membership for the opportunity and privilege of serving it as president and that I bespeak its cooperation, and pledge my own support to the incoming administration and to my friend, your new president, L. Louis Karton. May the wind be always at his back.

The Constitution and Religion in the Public Schools

By PAUL H. VISHNY

The following essay, somewhat condensed, by member Paul H. Vishny won the first prize in the Lawyers Division in a contest conducted recently by our Society among lawyers in Illinois and law students in the United States. Its subject was "The Constitution and religion in the public schools."

Mr. Vishny's L.L.B., cum laude, stems from DePaul University. He is also a graduate of The Hebrew Theological College, where he received his baccalaureate in Hebrew literature and his rank as a rabbi.

His articles and book reviews were published in DePaul Law Review, The Decalogue Journal, Hebrew Theological College Journal, The Congress Weekly, and The Chicago Jewish Forum.

Judges Julius H. Miner, Walter V. Schaefer, and Ulysses S. Schwartz selected the winning essays in the Lawyers Division of the contest.

The first prize winning essay in the Students Division will appear in a near issue of our Journal.

* * *

The American idea of religious freedom is embodied in the very first words of the Bill of Rights:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .[1]

A proper understanding of the scope of this fundamental pronouncement must precede any discussion of its application to the American public school. The initial problem is the difficult task of reconstructing the original meaning of the words. Aside from the fact that human limitations would have precluded any prescience of the precise problems of twentieth century life, so many persons participated in the drafting and language of the Bill of Rights that the existence of a universal intent is doubtful.

Nevertheless, the historical considerations surrounding the adoption of the First Amendment, and the development of the public school, are relevant. Indeed, they form the basis for decisions concerning religion in the schools,[2] as well as the specific grounds for criticism of those decisions in a dissenting opinion of Mr. Justice Reed, as well as other writings.[3] While some of the theories will be considered, a detailed study of the arguments is beyond the scope of this essay and would deserve separate treatment.

One view of the First Amendment is that it was intended only to prevent the establishment of an official church. In his dissenting opinion in the *McCollum* case, Mr. Justice Reed stated that the "phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church."[4] Others have felt certain in their conviction that "establishment of religion" plainly meant the setting up of an official church or the extension of preferential treatment to one religious sect as against another.[5] If this is so, it follows that non-preferential support of all religions is clearly permissible. The implications of such a thesis, which does not require neutrality between believers and non-believers, could well lead to the view that those who repudiate religion cannot look to the First Amendment for protection.[6] The view has also been expressed that only rivalry among *Christian* sects was meant to be eliminated.[7]

PAUL H. VISHNY

Whatever may be the interpretation of the First Amendment, its provisions affect the States only insofar as the Fourteenth Amendment makes them applicable. Some writers believe that the "establishment of religion" prohibition of the First Amendment was not made applicable to the States, so that the States may, apparently, establish religions if nobody is thereby deprived of religious liberty.[8]

In recent cases the Supreme Court has concerned itself with attempting to define the scope and effect of the First Amendment. In the *Everson* case,[9] the Court stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was 'intended to erect a wall of separation between church and State.' "[10]

The adoption by the Supreme Court of Jefferson's statement, which was originally made in a letter to the Danbury Baptists Association, was not an innovation. In 1878, Jefferson's language was called almost "an authoritative declaration of the scope and effect of the amendment" in a unanimous opinion of the Supreme Court.[11] The language of the opinion in the *Everson* case clearly shows that the Court rejected the theory that non-preferential aid to religion is permissible. This broad interpretation was affirmed in *McCollum* v. *Board of Education*,[12] and is supported by sound and substantial historical evidence.[13]

In the *Everson* case the Court also held that "the First Amendment as made applicable to the States by the Fourteenth . . . commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .' "[14]

In the 1952 case of *Zorach* v. *Clauson*,[15] the Supreme Court upheld the constitutionality of the "released time" system in force in New York City. Under this system children are released from school to attend religious classes elsewhere, while those not released remain in the classroom. The Court distinguished the facts from those considered in the *McCollum* case, where school classrooms were turned over to religious authorities for instruction while non-participants went to some other place in the school for secular studies. This latter system was held improper. In both cases, apparently, attendance was reported. In the *Zorach* case the issue of coercion was not tried and the Court found no evidence of coercion or the punishment of absentees. The Court stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.[16]

Other than the fact of instruction taking place in the public school itself, there is no real distinction between the facts in the *Zorach* case and the *McCollum* case. Whether this distinction is enough to justify the different result was questioned by Mr. Justice Black in his dissent.[17] Mr. Justice Jackson referred to the distinction as "trivial, almost to the point of cynicism."[18]

Mr. Justice Douglas, in his majority opinion, stated that the separation of Church and State must be complete, and that the First Amendment prohibition against establishment is "absolute." However, he then wrote that the First Amendment does not require a separation "in every and all respects." If this were not so, he reasoned, there could be no police or fire protection to religious groups, prayers in legislative halls, Thanksgiving proclamations or other familiar rituals. It may be suggested that Justice Douglas attempted to define certain permitted areas of "contact" between religion and government not constituting support or establishment. One such contact may be actually required by the "free exercise clause" as in the case of fire or police protection.[19] The same considerations are present in the supplying of chaplains to imprisoned persons or members of the Armed Services who are, it must be remembered, removed from the civilian opportunities of religious worship. Furthermore, not all of the traditional rituals are justified merely because they take place. Practice has not always conformed to the ideals of the law.

Released time systems and the teaching of religion in the schools make up but some of the questions which must be considered. Other practices, which have been suggested or in use, should concern any person interested in the place of religion in the schools. It is a widespread practice in the United States to read verses of the Bible in the school, usually without comment. Generally, the procedure is to read the verses from the Bible as part of a service which includes prayer and the singing of hymns.[20] The Supreme Court has not passed upon the propriety of Bible reading,[21] and the State courts have reached different conclusions, with a majority upholding the practice.[22] Those who support this practice argue that the Bible is non-sectarian. In any event, those children who object are excused; therefore, there is no compulsion. It is submitted that the practice of Bible reading or the recitation of prayers or hymns is improper even within the limits of the *Zorach* decision which prohibits the government from undertaking religious instruction, blending secular and sectarian education, or compelling religious observance.

The most eloquent statement of opposition to Bible reading comes from the Supreme Court of Illinois,[23] which held that the exercises of reading the Bible, joining in prayer and in the singing of hymns constitute an act of worship.

> 'The Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion and as to those who are heretical or who hold beliefs that are not regarded as orthodox. . . . No test suggests itself to us, and perhaps it would be impossible to lay down one, whereby to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine. Such a test seems impracticable. The only means of preventing sectarian instruction in the schools is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion.'[24]

The Church Federation of Greater Chicago, in its recent statement designed for communal study,[25] made a novel suggestion. It interprets the *Zorach* decision as permitting a "functional" cooperation between religion and government. That is to say, the schools may teach the functional role of religion in life, which includes emphasizing the "functional religious values" on which ethical choices should be based. "The essence of the functional view of religion," the statement declares, "is that religion has a functional significance . . . in the sense that God is recognized . . . as the ultimate sanction of conscience about right and wrong."[26] The statement admits that the very crux of the issue of secularism is *whether* a concept of God is necessary to the reproduction of moral and spiritual values. If so, what the Church Federation deems apparent is, actually, a matter of theological polemic, which, as stated by the Court in the *Ring* case, is to be banished from the schools.[27] For the school to teach that God is the source of all morality as an article of faith is to destroy neutrality between religion and nonreligion. Furthermore, religions differ not only in their concept of God, but in many specific issues of life which touch upon questions of morality.

In the light of the relevant decisions, there seems to be no constitutional justification for the prevalent practice of holiday observances, such as Christmas and Chanukah, in the public school to the extent to which these observances are theological in nature, asserting the sectarian doctrine of religion or religions, or consisting of acts of prayer and worship. Such celebrations constitute an infringement of the rights of those who do not accept the theological assertions which form the basis for such observances. The result is compulsion to engage in religious observance or sectarian instruction. People are so sensitive about objections to such observances that prudence may, in many or even

most situations, preclude any protest. Nevertheless, the constitutional objections are not different from the cases of religious instruction, Bible reading or prayer. The fact of the seasonal nature of the celebration is irrelevant. Surely we must object to a temporary deprivation of liberty just as we do when the deprivation is of longer duration.

There is evidence that children who are not members of the celebrating faith often experience a profound sense of emotional strain or discomfort in the face of such observance, or in the face of other sectarian instruction in the public schools.[29] What is the nature of this emotional strain? It is submitted that it is the experience of a loss of freedom, a reaction to the subtle compulsion of public school authority. Furthermore, religious observances in the public schools are likely to result in a conflict of authority between the home and the school in matters which are of the most profound and sacred significance.[30] Certainly, this is an interference with the constitutional right of the parents to control the religious upbringing of their children.

In view of the ever increasing church membership in the United States, it is natural that many persons should seek a common ground of belief which could be taught to children in the schools. Attempts to introduce into the public schools the "common core" of all religions would also violate the constitutional prohibitions. The very existence of a common core is denied by some theologians.[31] In addition, there are many persons who, although religious, do not share in the creeds and codes of the major faiths. Any attempt to eliminate the differences by creating a distilled non-sectarian faith existing apart from all ritual expression may bring a new, common religion which would be objectionable to all faiths. A more certain objection, however, is the fact that a common core program would transgress the rights of the non-believers. If they form but a small minority, then we must recall that "all stand equal before the law—the Protestant, the Catholic, the Mohammedan, the Jew, the Mormon, the free-thinker, the atheist. . . . It is precisely for the protection of the minority that constitutional limitations exist. . . ."[32]

There would seem to be no constitutional objections, however, to a properly designed program which would objectively teach *about* religion. The practical difficulties in such a program are apparent. There is a passion with which men of faith are likely to approach the study of religion, and the line between study and indoctrination is not readily ascertainable. Pfeffer suggests that this might be an area for private experimentation to test workability.[33]

To have stated that religion may not be taught in the schools is not to have proposed the final solution to the problem. There is, of course, the problem of definition—when is "religion" being taught?[34] Teaching "about" religion, religious institutions and works, suggests a partial answer. The objective consideration of religious art or music in general courses would not be objectionable. On the other hand, the use of art, music or any other means for the purpose of worship, proselytizing or instilling belief in all or some theological doctrines would transgress the proper limits. Justice Jackson, in his concurring opinion in the *McCollum* case, has posed the problem with great articulation.[35] The studies of history and science likewise pose difficult problems, when they include such subjects as biology, the germ theory of disease, or the Reformation and Inquisition. Needless to say, these problems are present even when there is no positive program of religious instruction. Such problems as these, which are inherent in the educational system, should not serve as a justification for practices which violate the concept of separation of Church and State.

This writer shares the view that religion is an indispensable element in the education of children. Such training is, however, the function of the home and the religious institution. The public school best accomplishes its purposes when it serves all children without trespassing upon the right of the home in matters touching upon religion.

The success of what may be called the American experiment of separation of church and state is apparent in the vitality of our religious life, as well as in the strength of our democratic institutions. It has helped make us a great and free people.

FOOTNOTES

1. U.S. Const. Amend. I.
2. **Everson v. Board of Education**, 330 U.S. 1 (1947). See the dissenting opinion of Mr. Justice Rutledge, 330 U.S. 1, 28-74. See also the concurring opinion of Mr. Justice Frankfurter in **McCollum v. Board of Education**, 333 U.S. 203, 212-232 (1948).
3. See the dissenting opinion of Mr. Justice Reed in the **McCollum** case, 333 U.S. 203, 238-256 (1948); O'Neill, **Religion and Education under the Constitution** (1949); Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3 (1949); Murray, Law or Prepossessions? 14 Law & Contemp. Prob. 23 (1949).
4. **McCollum v. Board of Education**, 333 U.S. 203, 244 (1948).
5. This was the view expressed in a statement issued by the National Catholic Welfare Conference as quoted in Pfeffer, Church and State; Something Less Than Separation, 19 U. of Chi. L. Rev. 1, 3 (1951); O'Neill, op. cit. **supra** note 3; Corwin, op. cit., **supra** note 3. The historical issues were debated by O'Neill and Pfeffer in The Meaning of Establishment—a Debate, 2 Buffalo L. Rev. 225-278 (1953).
6. This is the view of Father Parsons as quoted in **Pfeffer**, op. cit., **supra** note 5 at 7. See also **Zorach v. Clauson**, 99 N.Y.S. 2d. 339, 344 (1950).
7. This appears to have been the view of Justice Story. See **Pfeffer, Church, State and Freedom** 142 (1953). See also Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475 (1955).
8. Howe, **The Constitutional Question in Religion and the Free Society** 49 (1958); Pfeffer, op. cit. **supra** note 7 at 130 ff; Corwin, op. cit. **supra** note 3 at 19.
9. **Everson v. Board of Education**, 330 U.S. 1 (1947).
10. 330 U.S. 1, 15-16. See also 330 U.S. 1, 11.
11. **Reynolds v. U.S.**, 98 U.S. 145, 164 (1878).
12. 333 U.S. 203 (1948).
13. Dissenting opinion of Mr. Justice Rutledge in the Everson case, 330 U.S. 1, 28-74 (1947); Pfeffer, op. cit. **supra** note 7, 81-159; Konvitz, Separation of Church and State: The First Freedom, 14 Law & Contemp. Prob. 44 (1949).
14. 330 U.S. 1, 8 (1947).
15. **Zorach v. Clauson**, 343 U.S. 306 (1952).
16. 343 U.S. 306, 313-14 (1952).
17. 343 U.S. 306, 316 (1952).
18. 343 U.S. 306, 325 (1952).
19. **Everson v. Board of Education**, 330 U.S. 1, 16 (1946).
20. Pfeffer, op. cit. **supra** note 7 at 374-391, 394.
21. In **Doremus v. Board of Education**, 342 U.S. 429 (1952) the Supreme Court did not reach the constitutional issue.
22. The cases are cited and digested in Emerson & Haber, **Political and Civil Rights in the United States** (1952) at 969-973. See also Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475, 491 (1955).
23. **People ex. rel. Ring v. Board of Education**, 245 Ill. 334 (1910).
24. 245 Ill. 334, 347-348.
25. A Policy Statement on the Relation of the Churches to the Public Schools and the Place of Religion in Education, of the Church Federation of Greater Chicago (1958).
26. Op. cit. **supra** note 25 at 23.
27. 245 Ill. 334, 349 (1910).
28. Pfeffer and Baum, Public School Sectarianism and the Jewish Child—a Report of Experiences (1957). A mimeographed publication of the American Jewish Congress.
29. See, for example, the incident reported in Pfeffer and Baum, op. cit. **supra** note 28 at 10.
30. Nichols, Religion and Education in a Free Society, in **Religion in America** 148, 158 (1958).
31. **People ex rel. Ring v. Board of Education**, 245 Ill. 334, 346 (1910).
32. Pfeffer, op. cit. **supra** note 7 at 312.
33. Cushman, op. cit. **supra** note 22.
34. 333 U.S. 203, 235-238 (1947).

HERBERT A. GLIEBERMAN

Member Herbert A. Glieberman was elected president of Temple Sholom Men's Club for the year 1960-61. More than eight hundred men comprise the membership of this Club, one of the largest in this country.

Society Honors To Meyer C. Balin

The recipient of our Society's Inter-organization Award of Merit for 1959, Meyer C. Balin member of our Board of Managers, was born in Philadelphia, Pennsylvania. He arrived in Chicago with his parents when two years of age.

A graduate of John Marshall High School, he entered University of Illinois College of Pharmacy from which he received his degree of Ph.G. in 1925. His L.L.B. and J.D., stem from Chicago Kent College of Law. When at Kent he was president of his Junior and Senior classes. He was admitted to the Illinois Bar in 1929.

From 1925 to 1930 he taught at University of Illinois College of Pharmacy. From 1942 to 1945 he was an instructor at the University of Chicago Institute of Military Studies.

MEYER C. BALIN

Balin is a member of several Bar associations and law fraternities. Long active in communal life he was president of the Chicago Lodge B'nai B'rith in 1944, and president of the Chicago Drug Club in 1958. In 1952 and 1953 he was president of Hospital and Medical Charities, Inc. He is a trustee of the College and Pharmacy Alumni Association.

Balin's is an enviable record of service to our Society. As chairman of The Decalogue membership committee in 1959 his industry and application to duty are responsible for a hitherto unsurpassed number of additional members into our organization. These were obtained through his personal efforts and the leadership that he exerted as chairman of this committee.

Last October, primarily due to his efforts, he culminated months of labor in behalf of a project to bring into Washington 199 members of our Society for an unprecedented en masse appearance before the United States Supreme Court for admission to practice before that great body.

Balin's honors will be bestowed upon him at a dinner on June 8th at the Chicago Bar Association quarters, 29 So. La Salle Street at our Society's annual election of officers event.

Balin resides with his wife Beatrice and son Jay at 3745 Eastwood Ave. His married daughter's name is Sandra Silverman. The Balins are grandparents of two. His office address is 200 South Michigan Ave., Chicago.

Decalogue Outing on July 14th At Chevy Chase Country Club

The twenty-sixth annual Decalogue Society All Day Outing is scheduled to be held at Chevy Chase Country Club, on Thursday July 14th. This popular playground for our grand summer event possesses unsurpassed facilities for the enjoyment of our members, their families, and guests. Located on Milwaukee Avenue near Wheeling, Chevy Chase Country Club has in addition to a magnificent golf course, a swimming pool, gardens, and unrivaled facilities for sport games. The committee in charge of the affair is making great efforts to obtain attractive and useful prizes for free distribution at the outing.

Arrangements are in progress for the enjoyment of the wives of the members. Mrs. Ira Shapiro, president of the newly organized Decalogue Society Auxiliary will be assisted by Mrs. Meyer C. Balin and Mrs. Samuel Shkolnik in providing special entertainment for the ladies of our Society. Tickets for the affair at $10.00 per person will be available shortly. For further information please address our Society headquarters at 180 W. Washington Street, Chicago 2, Illinois.

First vice president Bernard E. Epton is chairman of The 1960 Decalogue Society Outing committee.

The Advantages of a Tax-Haven Corporation

By MICHAEL L. WEISSMAN

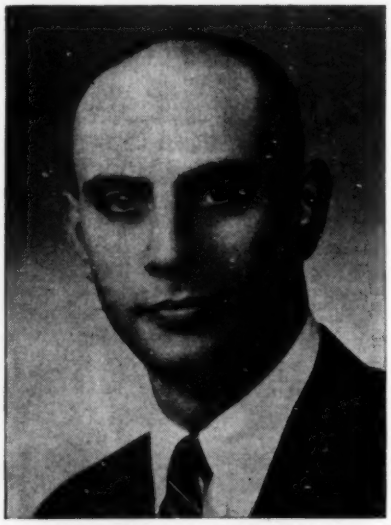
Member Michael L. Weissman is assistant professor of business law and accounting at Roosevelt University. His articles have appeared in recent issues of *American Journal of Comparative Law, Southern California Law Review,* and *The Journal of Taxation.*

It is becoming increasingly difficult to find a large American corporation which does not conduct business activities overseas. Corporate management is well aware of the profit potentialities in foreign markets. In the under-industrialized nations of the world, the profit potentialities are represented by a demand for heavy industrial equipment. But even in those countries in which industrialization is underway there is a strong demand for consumer goods and American technology. A prime example of the magnitude of American overseas investment is Australia. A report recently issued by the Australian government indicates that in 1948 American companies had only $115 million invested in Australia. By 1959, however, this figure had grown to $560 million and it is predicated that it will reach $1 billion by the end of 1960. At last count no less than 880 American firms are currently doing business in Australia. That these operations have been profitable is evident from the published statistics. Over the last ten years a profit of $477 million, or better than 400%, has been earned on the original 1948 investment of $115 million. Similar figures could be cited for other parts of the world. To illustrate, during the ten year period from 1946 to 1956 the investment of American companies in Latin America increased from approximately $3 billion to about $7 billion.

Obviously, these statistics reveal two facts. One is that large American corporations are able to successfully compete with local industry in foreign markets. And secondly, that the profit potentialities of foreign markets are so great as to generate an ever-increasing interest in overseas operations.[1]

In reaching a decision as to the proper vehicle for the organization of overseas operations management is clearly influenced by factors such as a desire to insulate the United States portion of the business from the control of foreign governments and a need to find the most effective means of managing the foreign business.[2] Nonetheless, it is equally apparent that the choice of a vehicle for the conduct of foreign business is dictated very largely by tax considerations. Tax considerations are important because tax consequences vary depending upon what kind of corporation is utilized to exploit foreign markets. Both the rate of tax (and, as a consequence, the net income after taxes) as well as the time when tax liability arises may change depending upon the entity through which overseas business is carried on. The purpose of this article is to briefly discuss the tax considerations involved in the choice of a corporate form for the conduct of foreign business activities.

A parent corporation in the United States has four basic forms of organization it may employ in conducting an active trade or business in a foreign country.[3] The parent company may organize its activities in a Western Hemisphere Trade Corporation or in a directly owned branch, or in a directly controlled foreign subsidiary corporation or it may establish a so-called "tax haven corporation" which, in turn, organizes branches or subsidiaries in the countries where active business operations are conducted. The latter method of organization may have decided advantages over the others and will be most strongly recommended.



MICHAEL L. WEISSMAN

WESTERN HEMISPHERE TRADE CORPORATIONS

Western Hemisphere Trade Corporations are of interest to companies engaged in overseas operations largely because such Trade Corporations are subject to tax in the United States at a maximum rate of 38 per cent of taxable income. Section 921 of the Internal Revenue Code provides that to qualify as a Western Hemisphere Trade Corporation, a corporation must:

1) Derive 95 per cent or more of its gross income from sources outside the United States,
2) Derive 90 per cent of such income from the active conduct of a trade or business,
3) Do all of its business in North, Central or South America or the West Indies, i.e., the Western Hemisphere.[4]

In addition to the above requirements, a Western Hemisphere Trade Corporation must be domestic in character, i.e., it must be incorporated in the United States. Reviewing these requirements it becomes readily apparent that in the ordinary case an American enterprise cannot qualify as a Western Hemisphere Trade Corporation. The usual American company derives the major portion of its income from the sale of its goods or services in the United States, that is its income is derived from sources *within* the United States.[5] But to qualify as a Western Hemisphere Trade Corporation a company must derive 95 per cent or more of its income from sources *outside* the United States. Thus, it is imperative that American companies set up Western

Hemisphere Trade Corporations as wholly-owned domestic subsidiaries. Thereafter, all trading within the Hemisphere is confined to the newly-created subsidiary so that it may satisfy the "source of income" test. However, the necessity of creating a subsidiary corporation has the disadvantage of diminishing the attractiveness of the Trade Corporation from a tax point of view. The 7.8 per cent tax on intercompany dividends raises the total burden of taxation on income from Western Hemisphere sources above the purported maximum rate of 38 per cent.

Western Hemisphere Trade Corporations have been utilized for the most part in two areas—natural resource extraction and export sales.[6] In the former they have proved satisfactory. This results from the fact that a Western Hemisphere Trade Corporation is a domestic company and, as such, may claim percentage depletion.[7] Insofar as export sales are concerned, the problems of successful use of the Trade Corporation have been far more substantial. As stated, to qualify as a Trade Corporation the company must derive 95 per cent of its income from sources outside the United States. In the case of the sale of goods it had been established that income from such sales arose from a source outside the United States if title passed in the foreign jurisdiction.[8] However, the Commissioner is currently taking the view that simply arranging to have title pass outside the United States will not be sufficient to characterize the income as stemming from a non-United States source. The Commissioner is arguing that if the "substance" of the transaction took place in the United States the income stems from a domestic source.[9] Thus, at this moment the precise status of subsidiaries organized as Western Hemisphere Trade Corporations to export goods from the United States is open to grave doubt. For this reason, a Western Hemisphere Trade Corporation is not to be recommended as a vehicle for the operation of an export trade.

Finally, other factors make the Western Hemisphere undesirable in comparison with other forms of doing business overseas. The Trade Corporation must restrict its activities solely to the Western Hemisphere and, thus, is precluded from exploiting lucrative markets in other parts of the world. In addition, if income is to be accumulated for reinvestment abroad, the Trade Corporation is decidedly less suited to this purpose than is a so-called "tax-haven" corporation. The Trade Corporation is immediately taxable at an effective rate of 38 per cent thus diminishing the net available for reinvestment to 62 per cent of taxable income. As will be illustrated, a "tax-haven" corporation may accumulate as much as 100 per cent of its income from foreign sources free of any taxation and, thus, have a far greater sum available for reinvestment overseas.

DIRECTLY-OWNED BRANCH

The tax consequences of using a branch established in a foreign country are identical to those which result when the United States parent corporation itself earns income from that foreign jurisdiction. In either case, such income is immediately taxable at the effective rate of 52 per cent. Certainly then, a branch operation has little to commend itself as a means of tax minimization with two possible exceptions. Use of a branch may be justified if the foreign venture involves natural resource extraction; in this way the depletion allowance is preserved. Moreover, if the foreign venture is likely to incur losses in its initial stages, a branch operation may be justified in view of the fact that such foreign losses may be offset against the parent company's domestic income.[10]

DIRECTLY-OWNED SUBSIDIARY CORPORATION

Directly-owned subsidiary corporations are usually employed in cases in which the country wherein the subsidiary is incorporated has an International Tax Convention with the United States.[11] Under many of these treaties the rate at which tax is withheld "at source" on dividends paid by the local subsidiary to its American parent corporation is substantially reduced. At the moment, the United States has a rather comprehensive network of tax treaties with Western European countries as well as South Africa, Australia, New Zealand and Canada. Despite the existence of these tax treaties, directly-owned operating subsidiaries are not favored. Although the burden of withholding tax "at source" may be reduced, any dividends received from such foreign corporations are immediately taxable at 52 per cent. The 85 per cent intercompany dividend credit does not apply to dividends received from a foreign corporation.[12] Unless the American parent corporation wishes to accumulate income in its directly-controlled foreign subsidiary for purposes of reinvestment in the country in which such income has been earned there is no tax advantage to the use of such a corporation. It is true that the tax paid "at source" may be credited against the United States tax due on dividends received whenever the subsidiary is at least 10 per cent owned.[13] But this does not detract from the fact that the total burden of taxation, foreign and domestic, imposed on dividends received from directly-controlled foreign subsidiaries will be at the rate of 52 per cent. Thus, an American corporation cannot derive dividend income from a directly-controlled foreign subsidiary for purposes of reinvestment in some other foreign country without suffering a tax at an over-all effective rate of 52 per cent. It is precisely this problem which has led to the formation of "tax-haven" corporations.

TAX-HAVEN CORPORATIONS

In recent years, companies doing business overseas have frequently established "tax-haven" corporations the stock of which is owned by the American parent company. A tax-haven corporation is one which is formed in a foreign country with a favorable tax climate and is entrusted with the control of all or a portion of the foreign business of a United States parent company. Such a tax-haven corporation may take charge of exporting and licensing, make investments in foreign subsidiaries, finance foreign or domestic sales, or perform other activities abroad.[14]

Tax-haven corporations have proved attractive for two reasons. First and foremost because the laws of the countries in which such corporations are formed impose only negligible taxes, or no taxes at all, on income of domestic corporations derived from sources outside their borders. And second because the United States Internal Revenue Code only taxes the income of a foreign corporation when such income is earned within the United States.[15] Most tax-haven corporations do not earn income from United States sources. As to the latter point, however, it *is* true that no United States taxes would be imposed on income of a foreign subsidiary earned from local manufacturing or selling and owned directly by the American parent company until remitted to the United States by way of dividends. However, as soon as dividends are received by the American parent company the high rates of United States taxation are payable. In the case of a tax-haven corporation, which is given the controlling interest in manufacturing or selling companies established in other foreign countries, dividends may be paid to the tax-haven corporation subject only to the tax imposed "at source"

and the net proceeds used for reinvestment in other countries. In this manner, the income earned in one country may be accumulated for reinvestment in other parts of the world free of the high rates of corporate income taxation imposed on United States corporations. To the extent that the rates of taxation in the tax-haven country are lower than in the United States, the net after taxes is increased and more income is available for reinvestment. Tax-haven corporations are the most satisfactory means of making foreign operations self-sustaining.

Many countries have amended their tax laws to make themselves desirable as areas for the incorporation of tax-haven subsidiaries by American companies, Panama, Venezuela, Liberia, The Bahamas, Switzerland and the Netherlands Antilles[16] are the ones most frequently used.

There can be but little doubt that tax-haven corporations are the most feasible means of accumulating large amounts of earnings free of United States taxes and for using such earnings to finance new overseas ventures. Of course this has the further advantage of releasing the parent company's own funds, formerly devoted to foreign operations, for domestic use.[17]

Granting the attractiveness of a tax-haven corporation from the point of view of current operations the question which next arises is what is the most advantageous means of returning the earnings of a tax-haven corporation to its United States parent. Assuming that the tax-haven subsidiary has substantial accumulated earnings and that those earnings have been taxed "at source" prior to their remission to the tax-haven corporation, the preferential means of returning the income to the United States parent corporation is in the form of dividends. Only in this way will the foreign tax credit provided in Section 902 of the Code be preserved. Payment in the form of dividends permits the United States parent company to credit against its United States liability not only the foreign taxes paid by the tax-haven corporation but also any foreign taxes paid by the various companies which the tax-haven corporation controls.[18]

Another possible means of returning the accumulated earnings of the tax-haven corporation is through its dissolution. Although this results in capital gains taxation at the maximum rate of 25 per cent it wholly precludes any claim for the foreign tax credit since the credit may only be taken with respect to dividends and, in most cases, it is the foreign tax credit which will result in more substantial tax savings.

PENDING LEGISLATION

The failure of Congress to afford any new incentives toward the earning of foreign-source income has been largely responsible for the trend toward the creation of tax-haven corporations. In the last session of Congress a bill was introduced to create a new class of American corporation called a Foreign Business Corporation.[19] Under this bill an American Foreign Corporation could have withdrawn earnings from one foreign country and reinvested them in another foreign country without suffering any United States tax. The payment of United States taxes was deferred until the income of the Foreign Business Corporation was actually distributed. Unfortunately, the bill was lost in the legislative shuffle of Congress and failed of passage.

The English Parliament has recognized the need for legislation of this type. The Finance Act, 1957, created a new category of taxpayer called the Overseas Trade Corporation. The heart of this legislation is virtually identical to that which was embodied in the bill to create the Foreign Business Corporation—deferral of tax on foreign earnings until actually distributed. The bill to create a Foreign Business Corporation has been reintroduced in the current session of Congress and it is hoped that it will meet with success. Perhaps Congress will come to realize, as did the British Parliament, that tax deferral is required if American companies are to effectively compete with foreign producers in foreign markets. Until such legislation is forthcoming the most satisfactory means of conducting foreign operations continues to be the tax-haven corporation.

FOOTNOTES

1. Cameron, *Taxes in Organizing a Business Abroad*, 106 J. of Accountancy 45 (1958).
2. Wender, *Use of "Tax Haven" Corporations and Western Hemisphere Trade Corporations*, 1959 So. Calif. Tax Inst. 253.
3. Gibbons, *Tax Factors in Basing International Business Abroad* (1957) at p. 4.
4. Treas. Reg. 1. 921-1 permits a Western Hemisphere Trade Corporation to make purchases outside the Western Hemisphere up to a maximum of 5 per cent of its gross receipts without losing its status as a Western Hemisphere Trade Corporation.
5. The rules governing the geographical "source" of income are found in Sections 861-864 of the Internal Revenue Code.
6. Wender, *op. cit. supra*, note 2, at p. 276.
7. See Sec. 613 of the Internal Revenue Code.
8. See *Commissioner* v. *East Coast Oil Co. S. A.*, 85 F. 2d 322 (5th Cir. 1936), *aff'g* 31 B. T. A. 558 (1934) *cert. den.*, 299 U. S. 608 (1936); Exolon Co., 45 B. T. A. 884 (1941); Ronrico Corp., 44 B. T. A. 1130 (1941); *United States* v. *Balanovski*, 236 F. 2d 317 (2d Cir., 1956).
9. Wender, *op, cit. supra*, note 2, at pp. 227-28.
10. Gibbons, *op. cit. supra*, note 3, at p. 5.
11. *Ibid.*
12. Section 243 (a) of the Internal Revenue Code restricts the deduction to dividends received from other domestic corporations.
13. Section 902 (a) of the Internal Revenue Code.
14. Baker, *Methods and Channels of Foreign Trade*, 1959 Univ. of Ill. L. Forum 142, 145.
15. Section 882 of the Internal Revenue Code.
16. For a full discussion of the Netherlands Antilles and its peculiar tax advantages see, Weissman, *Tax Advantages of the Netherlands Antilles for Motion Picture Companies*, 32 So. Calif. L. Rev. 391 (1959).
17. Gibbons, *op. cit. supra*, note 3, at p. 9.
18. It is assumed that the tax-haven corporation owns at least 50 per cent of the voting stock of the various foreign manufacturing and selling subsidiaries from which it receives dividends. See Section 902 (b) of the Internal Revenue Code.
19. H. R. 5, 86th Cong., 1st Sess. (1959).

Complete Legal Education Series For 1959-60

The most ambitious legal education series in the history of The Decalogue Society ended on May 25, when the thirty-first lecture in the series was given. The chairman of the committee this year, like last year, was past president Elmer Gertz. Board member, Matilda Fenberg, was co-chairman. Attendance held up remarkably well, with only a few talks attracting less than substantial numbers. The series has also resulted in several articles for The Decalogue Journal, some already published and some which will appear later. Chairman Gertz would like to hear from members as to the subjects and speakers for any further lectures sponsored by the committee. Communications should be sent to Mr. Elmer Gertz at Suite 1351, 120 South La Salle Street, Chicago 3. As it is hoped that next year's series may be arranged during the early months of the summer, prompt attention to the plans for next year is requested.

The following lectures were given since the first of the year in addition to the talks delivered in the fall of 1959:

FINALITY OF DECISION FOR APPEALS IN FEDERAL COURTS
Zeamore A. Ader

THE TRIAL OF A WORKMAN'S COMPENSATION CLAIM
E. Anne Mazur

SCHOOL DISTRICT LAW
Everett Lewy

ZONING LAW AND PROCEDURE
Seymour Fox

DEFENCES IN MECHANICS LIEN FORECLOSURES
Bernard H. Raskin

THE NEW ILLINOIS LAW ON DRUGS, DEVICES, COSMETICS, AND HAZARDOUS HOUSEHOLD SUBSTANCES
Albert I. Kegan

DEPORTATION UNDER THE IMMIGRATION AND NATIONALITY LAW
Charles Gordon

RECENT DEVELOPMENTS IN ILLINOIS PROBATE LAW
Nat M. Kahn

JURY INSTRUCTIONS IN CIVIL CASES
Louis G. Davidson

PROPERTY RIGHTS IN YOUR NAME, LIKENESS AND PERSONALITY
Harold R. Gordon

WHEN IS NEGLIGENCE ACTIONABLE?
Leo S. Karlin

TRIAL STRATEGY
Hirsch E. Soble

THE LAWYER AND UNEMPLOYMENT COMPENSATION
Samuel C. Bernstein

Applications for Membership

MEYER C. BALIN, *chairman*
STANLEY STOLLER, *co-chairman*

APPLICANTS	*SPONSORS*
David H. Addis	Lester Mehlman Meyer Weinberg
Theodore R. Birndorf	Charles G. Levy Marvin Juron
James J. Brown	Alec E. Weinrob Hyman Feldman
Edward L. Cooper	Arwin M. Zoller Favil David Berns
Stuart T. Edelstein	Meyer Weinberg I. Harvey Levinson
Neil Greenbaum	Marvin Juron Favil David Berns
Howard I. Malkin	Earle Malkin Harry Malkin
Seymour I. Regal	Alec E. Weinrob Maurice Raizes
Theodore Richter	Marvin Juron Louis Swidler
Marvin Sacks	Benjamin Weintroub Everett Lewy
Hugh J. Schwartzberg	Roy M. Schwartzberg Zeamore A. Ader
Robert Shane	Norman S. Rothbart A. Abraham Ziedman
Harvey M. Silets	Julius H. Miner Marvin Juron
Leonard Simons	Meyer Weinberg Benjamin Weintroub
Leo K. Wykell	Benjamin Weintroub Elmer Gertz

. . . If we must accept fate, we are not less compelled to assert liberty, the significance of the individual, the grandeur of duty, the power of character. We are sure, though we know not how, that necessity does comport with liberty, the individual with the world, my polarity with the spirit of the times. . . .

Ralph Waldo Emerson

THE FAIR LABOR STANDARDS ACT
Herman Grant

LABOR LAW FOR THE GENERAL PRACTITIONER
Samuel Edes

NEW ASPECTS OF MATRIMONIAL LAW
Meyer Weinberg

PANEL DISCUSSION ON ADOPTION — NEW LAW AND PROCEDURE
Michael Levin, Moderator, S. Edward Bloom and Harry D. Cohen

REAL ESTATE SALES IN MINORITY COMMUNITIES
Mark J. Satter

LIBEL AND SLANDER TODAY
Elmer Gertz

THE NEW LABOR LAW AND THE RIGHTS OF UNION MEMBERS THEREUNDER
Harold A. Katz

SOCIETY OBSERVES LAW DAY, U.S.A.

ESSAY CONTEST PRIZES DISTRIBUTED

The Decalogue Society of Lawyers marked Law Day, U.S.A. by presenting awards to the winners of its recently concluded essay contest on the subject "Should Religion be taught in Public Schools," at a luncheon on Friday, April 29, at the Covenant Club. A large gathering of members and their friends came to celebrate this event. Several members of the Judiciary who judged the merits of the submitted manuscripts and chose the winners were at the dais. Members of the Bench and Bar and civic and business leaders were in the audience.

SOLOMON JESMER

In his introduction, president Meyer Weinberg, who presided at the affair, said:

> We feel that we can best make our contribution to the public understanding of our profession if we encourage lawyers and students to examine the more basic constitutional concepts, without regard to whether or not they are popular or controversial. We believe that it is our obligation as lawyers to point the way to some understanding of the constitutional principles that have made our country unique and great. We are the first nation to incorporate the concept of the separation of church and state in our Constitution. This year, more than in most previous years, the matter is the subject of discussion and debate.

In addition to the ceremonies in connection with the presentation of the prizes to the winners, Dean John C. Fitzgerald of the Loyola University Law School, now acting as Deputy Court Administrator for Cook County, spoke on matters of interest to lawyers and the public arising out of the new administrative set-up of the legal courts.

Solomon Jesmer, past president of The Decalogue Society of Lawyers, in whose administration the contest originated, spoke on Thomas Jefferson, who played a decisive part in establishing the principle of separation of church and state. Mr. Jesmer's address appears below.

Joseph S. Grant, chairman of the essay contest committee, presented the cash prizes to the winners. In the lawyers' division the winner of the $500-first prize was Paul H. Vishny, whose essay appears elsewhere in this issue; the $250-second prize winner was Mary V. Neff; and the $100-third prize was won by Alfred W. Israelstam. All three winners practice law in Chicago.

In the law-student division the $300-first prize was won by Walter Olenick, of Seaton Hall University School of Law, Newark, New Jersey; the $200-second prize went to Fred Steingold, of the University of Michigan Law School, Ann Arbor, Michigan; and the $100-third prize was won by Morris M. Goldings, of the Harvard University Law School, Cambridge, Massachusetts.

Past President Elmer Gertz is president of The Decalogue Foundation, Inc., a charitable and educational organization set up by The Decalogue Society of Lawyers, which supplied the funds for the contest through voluntary contributions of Decalogue members.

Jefferson on Separation of Church and State

By Solomon Jesmer

Of all the great presidents of the United States, only the memory of Washington and Lincoln is officially honored. Only their birthdays are officially observed every year. There is, however, a third great president who, I believe, belongs in their illustrious company. His birthday this month is scarcely noticed. The politicians and the educators of our country are equally guilty for relegating the memory of Jefferson to practical oblivion. I have in mind the national scene and not the occasional after-dinner speeches where speakers profess to be Jeffersonian Democrats or Republicans, nor public-school textbooks where Jefferson's name is also mentioned. As Washington led the colonies to victory during the War of Independence, as Lincoln preserved the Union, Jefferson, the author of the Declaration of Independence, gave everlasting meaning and spirit to the Union that Washington helped create and Lincoln helped preserve.

It seems hard to believe that less than two hundred years ago Jefferson's Virginia had an established church, the Episcopalian, like that of England; only a marriage performed by an Episcopalian minister was a recognized marriage. Quakers who violated a regulation for their non-admission into Virginia were jailed for the first offense of disobedience and were subject to the death penalty for a second transgression. In such an atmosphere of intolerance and enforced conformity Jefferson advocated complete freedom of religion.

May I quote a passage from Jefferson's writings which would seem daring even in this day of Huxley and Darwin:

> . . . It does no injury, Jefferson said, for my neighbor to say there are twenty Gods or no God. It neither picks my pocket or breaks my leg. . . . Is uniformity of opinion desirable . . . no more than face or stature? . . . Millions of innocent men, women, and children since the days of Christianity have been burnt, tortured, fined, and imprisoned, yet we have not advanced one inch toward uniformity. The effect of this coercion has been to make one-half of the world fools and the other half hypocrites. . . .

The power of Jefferson's logic, his intellect, and his dedication to the concept of individual freedom finally prevailed, and his "Bill for Religious Freedom in Virginia" became a law. Later this principle of separation of church and state, the principle of absolute religious freedom, became part of the Constitution of the United States through the First Amendment in our Bill of Rights.

Jefferson, as we all know, wrote the Declaration of Independence; he fought for the adoption of the Bill of Rights. He was the apostle of the *religion of liberty* and the *liberty of religion;* he was against slavery. As president, he signed a bill forbidding the importation of slaves; it was Jefferson who advocated free public education—a revolutionary concept in those days; he fought against severe and brutal laws; he strove for the progress of science in all its branches:

> The main object of all science, he said, is the freedom and happiness of man.

Finally, he was responsible for the abrogation of the Alien Laws and Sedition Laws—the "McCarran-Walter Laws" of Alexander Hamilton and John Adams. By abrogating the Alien and Sedition Laws, Jefferson was directly responsible for the influx of millions of immigrants into the United States, the millions who came through the open doors of the only country in the world where religious and personal freedom was coupled with economic opportunity. These millions helped build the great, powerful, and free America of today.

In the little time at my disposal I have enumerated but a few of his most important achievements. I believe you will admit that they are more than sufficient to qualify him among the world's great of all times, to entitle him to the recognition given to Washington and Lincoln.

And now a few words about the Essay Contest that has just been completed.

Some groups in this land of ours have been advocating in recent years the teaching of religion in public schools. As lawyers, we of The Decalogue felt that an enlightened discussion of the subject would benefit the profession as well as the public. The Decalogue Society, therefore, offered an essay contest, with cash prizes to lawyers and law students. The subject was "The Constitution and Religion in Public Schools." A number of essays were submitted by lawyers of the State of Illinois and a substantial number by students from many law schools in the United States.

The winners in the Lawyers' contest are three Chicago lawyers. They are here with us. I take this opportunity to extend to them my congratulations and compliment them on the excellence of their papers. The impact of Jefferson on informed American thinking in the area of separation of church and state is demonstrated by the fact that nearly all the essays submitted referred to "The Wall of Separation," the famous Jefferson phrase.

I wish to express my thanks to all the lawyers and students who participated in this project. My special appreciation and that of the Society are extended to the judges of the contest, Justice Walter V. Schaefer, Judge Ulysses S. Schwartz, Judge Julius J. Hoffman, Judge Julius H. Miner, Judge John V. McCormick, and Judge Abraham L. Marovitz. My thanks to my friends, Elmer Gertz, Director of Decalogue Public Relations and Ben Weintroub, Editor of The Decalogue Journal, for their sound and valuable advice; and last, but not least, to Joseph S. Grant, lawyer-banker, chairman of the contest committee, who helped raise the necessary funds—$1,450 distributed to the winners. And my thanks, of course, to the members of the committee who helped plan and direct the essay contest.

DEDICATE NEW LAW SCHOOL

Miss Matilda Fenberg, member of our Board of Managers, represented The National Association of Women Lawyers at the special ceremonies held on April 29, 30, and May 1st at the final dedication and Law Day celebration of the new Law School at the University of Chicago. Governor Nelson Rockefeller of New York delivered the special convocation address to the students and guests of the new Law School.

VERSE

"The true poem is the poet's mind . . ." Emerson

THE ART OF CROSS-EXAMINATION

Not every cross-examination
Deserves unstinted commendation.
Did he drive sixty or drive ten?
Fifty? Twenty?—Seesaw then.
Why be evasive, Mr. Rich?
You met head-on but which struck which?
Did you observe what cars were there
While you were flying through the air?
How long were you unconscious, sir?
The answer's hearsay, I concur.
Did you admit you were to blame
Before your own adjuster came?
You must not guess but estimate
How far you drove and at what rate.
What length of time elapsed between
The crash and when the light turned green?
Colliding drivers, though in terror,
Could minimize judicial error
By reading their speedometer,
A stop-watch and micrometer.

By permission of Judge Frank G. Swain
from *Judicial Jingles*

HOME BUILDERS AND SCHOOL DISTRICTS

By EVERETT LEWY

Member Everett Lewy is a lecturer on Real Property Law at John Marshall Law School, and Attorney for Community Consolidated School District No. 21 (Wheeling), and District No. 59 (Elk Grove Village). He is former City Attorney for the City of Northlake. He is the author of "Drumhead Justice in Capital Cases in Illinois" which appeared in The Decalogue Journal, volume 1, No. 3.

There are in Cook County 128 elementary school districts, 28 high school districts, and one unit (combined elementary and high school) district. The unit district, of course, is the City of Chicago School District, and it is governed by a Board of Education whose members are appointed by the Mayor of the city with the approval of the City Council. The separate elementary and high school districts, which cover the entire county outside the City of Chicago, are governed by Boards of three Directors if their population is less than 1,000, or by Boards of Education of seven members, where the population is 1,000 or more and not more than 500,000. These Boards of Directors and Boards of Education are elected by the residents of the district and must be United States citizens over twenty-one years of age and residents of the State, County, and School District for at least one year immediately preceding the election.

The system of self-governing locally controlled school districts is generally followed throughout the United States and differs from the centrally controlled systems of almost every other country in the world. The locally controlled and elected school district system, in spite of occasional criticism, has been spectacularly successful. Its success has been a great tribute to the public-spirited School Board members, who devote untold time and effort to their work without compensation, and a great tribute to the American idea that the people are capable of governing themselves well.

One of the most difficult problems that School Boards in large metropolitan areas have had to meet since World War II ended in 1945 is the population explosion. Forty acres of land, which in 1940 produced, say, $3,000.00 worth of vegetables and two children of elementary school age, now, twenty years later, produce no vegetables at all but at least 120 school-age children. For example, one school district in the county had an enrollment of 143 students in the fall of 1950, 1,406 in the fall of 1959, and confidently expects to have an enrollment in the fall of 1960, less than a year hence, of 2,500.

Although a State law enacted in 1959 gives some help to districts which have exhausted, and will exhaust, their bonding power, this law is cumbersome and inadequate. Most districts are depending on general obligation bonds, payable from general taxes, for the money with which to build new school buildings. The total indebtedness of any school district is limited, by Article IX of the State Constitution, to five per cent of the assessed value of all taxable property in the district. A new home completed and occupied in January will not show up on the tax rolls as an increase in the assessed value for well over a year and will pay no taxes, except as vacant land, for another year and a half, but the children who live there must be furnished school rooms and teachers the day after they move in.

Furthermore, many districts have an inadequate amount of industry to help carry the tax load which is too heavy for residential property alone to carry. To put it mildly, most of the outlying districts have been hard pressed to find the funds necessary to build the tremendous number of new classrooms needed and to get the necessary operating funds to pay sufficient teachers. It is only natural that they should look to the builders, who have attracted the overload of children to the district, for help. A modest amount per home—which, of course, could be passed on by the builder to the purchaser—paid to the district in the form of land, money, or other help may often be the difference between a district's getting over the hump and not doing so.

How have school districts persuaded builders to help them, and what lawful pressures have districts been able to exert to induce reluctant builders to help solve the problems they have created?

EVERETT LEWY

The first approach used by school boards was to oppose attempts by builders to have their property re-zoned for residential purposes unless they agreed to make reasonable contributions for school purposes. In most cases the land was zoned for farming and had to be re-zoned for residential purposes under the provisions of the County Zoning Act (Ill. Rev. Stat. 1959, Chapter 34, Sec. 152 i—p). The County Zoning Act clearly provides that counties may zone land for the purpose of promoting "public health, safety, morals, comfort, and the general welfare." It would appear that there would be no question in the mind of any reasonable person that adequate education for school-age children is a matter concerning the public welfare. The

Cook County Zoning Board of Appeals, however, has not taken this view, and has consistently recommended re-zoning for residential purposes where builders have made no arrangements whatsoever to assist the local school boards to carry the greatly increased load they propose to dump on them. Except for occasional pious declarations of great regret that they can do nothing for them, the Cook County Zoning Board of Appeals has been much more of a hindrance than a help to the local school boards that have been trying to solve these crushing problems. Fortunately, however, the County Zoning Act (Sec. 152 n) contains a provision that any *re-zoning* must be approved by a three-fourths affirmative vote of the County Board, regardless of the recommendations of the Zoning Board of Appeals where a municipality within one and a half miles of the area objects to the re-zoning, or where a certain percentage of the adjoining property owners file objections. The five country-town members (and some of the city members also) of the fifteen-member Board have consistently refused re-zoning until builders have made reasonable arrangements with the local school districts to help carry the increased educational load. These arrangements have usually been contributions of land for school sites, money contributions of $100.00 to $300.00 a home, or both, or, in some cases, actually building a school building. Although no contract made by a builder, of which the author knows, has called on the builder to meet the entire additional cost of providing buildings for or educating the extra children brought to the district, these contributions by builders have been most helpful to the school districts (and, of course, to the builders), and in many cases have been the difference between the local school district's being able to furnish decent educational opportunities and not being able to do so.

So far as known, no case where the County Board has refused re-zoning has been brought to court. The Supreme Court has consistently held, however, that in exercising its zoning functions, the County Board (or other municipality) acts in a legislative capacity; that its actions are presumed valid and will not be disturbed unless they are shown to be arbitrary, capricious, and not related to the public welfare. (*Wesemann v. Village of LaGrange Park*, 407 Ill. 81; *Anderson v. The County of Cook*, 9 Ill. 2d 568).

Use of the County Zoning Act to bring pressure on the builders, although very effective, is sometimes unwieldy. Another approach more commonly used now to induce builders to cooperate with school boards is under the Municipal Plan Commission Act (Ill. Rev. Stat. 1959, Chapter 24, Sec. 53-54). This act provides that if any municipality (city, village, or unincorporated town) adopts a comprehensive plan, no map or plat of subdivision affecting land within the municipality or within one and a half miles of its borders shall be entitled to record unless it provides for "streets, alleys, . . . and public grounds in conformity with the applicable requirements of the approved plan." (Sec. 53-3). Section 53-2 provides that the approved plan may "include reasonable requirements with reference to streets, alleys, and public grounds in unsubdivided land situated within the corporate limits or in the contiguous territory not more than one and one-half mlies from the corporate limits." The same section specifically authorizes municipalities to establish reasonable requirements for "parks, playgrounds, *school grounds*, and other public grounds" (emphasis supplied).

Most of the unsubdivided land in the County is within one and a half miles of a municipality and most municipalities in the county have adopted comprehensive plans which require the dedication of a certain percentage of the property (usually five to ten per cent in value of all the land in the subdivision) for school or for school and park purposes. Local planning boards have in practice been quite flexible in cooperating with school boards and builders who wish to vary the arrangements by trading cash contributions for land, in most cases where such agreements would be more advantageous to the builders and the school districts.

The Planning Commission Act today is probably the most common form of help which the school districts obtain from neighboring local governments.

Much of the best help which school districts have obtained from builders has been given without any pressure whatsoever. It is obviously as much to the advantage of a responsible builder as to the school districts to have adequate educational facilities available in or near their subdivision where they expect to sell homes to families with school-age children. Builders have voluntarily contracted to donate land and building for schools (one as large as a twelve-room school), or to donate substantial sums of money and tracts of land to school districts which agree to locate and build schools in their subdivision earlier than they would be able to without this help. One fairly common type of such contract provides that the builder will construct and rent a school to the local district at nominal cost ($1.00 per year), with an option on the part of the district to purchase the same for the net cost of constructing the building (the land is usually donated) when it acquires sufficient bonding capacity to obtain the funds (usually a five-year option). The powers given boards of education to select a suitable schoolhouse site (Ill. Rev. Stat. 1959, Chapter 122, Sec. 6-24 and Sec. 7-17) and to provide revenue necessary to maintain schools (Sec. 6-18) appear to be adequate authority for making such contracts.

Eventually local school districts will overcome the severe, growing pains that they now suffer. An intelligent and cooperative approach by the two parties most concerned—the public (represented by the school boards) and the builders who brought the public there—will work out for the best interests of both.

PRESIDENT MEYER WEINBERG PUBLISHES NEW BOOK

The Bobbs-Merrill Publishing Co. announces the forthcoming publication of a current six year Supplement (up to April 1, 1960) to *Illinois Divorce, Separate Maintenance, and Annulment* (with Forms) by Meyer Weinberg, president of our Society. This is the third publication by Weinberg in the field of Family Law including his parent divorce book which has become a standard text in the State of Illinois and, a 1958 Supplement to the 3rd Edition of Keezer's Marriage & Divorce, a national text.

Weinberg is also the editor of the "Family Law Bulletin" of the Illinois State Bar Association.

Jacob M. Fishman installed

Member Jacob M. Fishman, long active in civic and religious causes in this city, was recently installed as president of Ner Tamid Congregation, Rosemont at California avenue.

BOOK REVIEWS

EVIDENCE OF GUILT: Restrictions Upon Its Discovery or Compulsory Disclosure, by John MacArthur Maguire. Little Brown & Company, 247 pp. $12.50.

By Irwin N. Cohen

Member Irwin N. Cohen is Commissioner of Investigations of the City of Chicago.

Here is a book in the grand Wigmore tradition by the Royall Professor of Law, Emeritus, at Harvard, John MacArthur Maguire. The subject matter is described at the very beginning:

> Lawyers in the United States have long known that a most significant part of the country's law of evidence is a complex of rules for shielding persons . . . against what are claimed to be tyrannous pressures by officialdom. . . . (A) technical treatise of fair comprehensiveness about them seems timely.

Professor Maguire covers, in depth, (1) the privilege against self-incrimination, (2) the bar on involuntary confessions, (3) the question of evidence obtained through unreasonable search or seizure, (4) the exclusion of unauthorized interception by government officials of wire or radio communications, and (5) the *McNabb*[1] and *Mallory*[2] rules which exclude admissions and confessions made during "illegal" detention. These topics are analyzed on a comparative basis. By an ingenious numbering system the impact of a given question on any of the classes of questioned evidence is readily ascertainable. Thus, specimen situations giving rise to the play of the rule involved are found under Section .01 of each chapter. Again, if the reader wishes to know the reason for the protective rule in question he would examine Section .02 of the appropriate chapter.

Each subject is exhaustively covered: the historical development of the rule, the arguments for and against admissibility, and the practical consequences flowing from the various alternatives. All the nuances of the general rule are examined. The author's great powers of condensation—the entire volume runs only to 243 pages, and half of those are in the form of footnotes — are apparent. There are the frequent flashes of insight which illuminate the field, exposing the interplay of the various forces involved, and demonstrate the intense practicality of the author as well as his vast erudition. As an example, he suggests that it might be instructive to ascertain whether the adoption of the exclusionary rule as to the product of an unreasonable search and seizure has been accompanied by a relaxation of the requirements for making a lawful arrest without a warrant.

1 McNabb v. U.S., 318 U.S. 332 (1943).
2 Mallory v. U.S., 354 U.S. 449 (1957).

The book reveals that when the State of Israel in 1953 was considering the questions discussed in this book, conferees included the Attorney General of Israel, a Justice of the Israeli Supreme Court, a Judge of the Magistrate's Court of Tel Aviv, American judges, practitioners, and teachers of law. The privilege against self-incrimination and the rule barring confessions not made voluntarily were, in the main, adopted. As Professor Maguire states: "Thus the two oldest and probably most frequently invoked evidentiary protections of the American criminal defendant survived what may fairly be called international inspection." As to the three "junior protective devices"—the *McNabb-Mallory* rule, suppression of the product of unreasonable search and seizure, and restraint on evidential use of intercepted tele-communications—the author believes some doubt persists and the rules "need some reshaping."

Professor Maguire is not the least bit hesitant about forcefully expressing his opinion on the controversial questions discussed (shades of Wigmore!). The writing is marked by verve and colorful phrasing not often found in legal volumes. The author is so much the master of his subject that he can afford to indulge in the light touch and gentle spoofing. Thus, when discussing a court's position that a certain irrational (to Maguire) view on evidence should be passed upon by Congress, the author comments, "That is, the lunacy is legislative, not judicial." The book contains material as recent as the July, 1959, advance sheets, and there are frequent references to the Model Code of Evidence and the Uniform Rules of Evidence. Professor Maguire's scholarly analysis of the material, a most informative index, and complete tables of cases, statutes, rules, and secondary authorities combine to make up the best book now available in this field.

DIARY OF a D. A., by Martin Frank. Henry Holt and Company, 274 pp. $3.95.

Reviewed by Benjamin Weintroub

This book depicts the professional experiences of the author a former Bronx, New York, assistant district attorney, a post he held for sixteen years. He is now an Associate Justice of the Appellate division of the New York State Supreme Court.

As a prosecuting attorney Frank was ever in close contact with the Bronx police in an effort to secure through them direct or circumstantial evidence to convict culprits in cases assigned to him. Frequently, to begin with, there were only inadequate clues to follow up and the prosecuting attorneys whose duties, traditionally, confined them to their courtrooms were called upon to help with the solution of a crime. The participation of the prosecuting attorneys in police work was introduced

by the then chief of the Bronx district attorney's office who delegated several of his assistants "on loan" to the precinct police in the borough. The head of the law division felt that trained lawyers, at elbow range cooperation with detectives would or could, upon capture of the felon, best strengthen their cases for trials ahead.

Judge Frank's memoirs deal with a number of cases, all presently part of public record and their sum total is an astonishingly interesting, lively told, human document. The *Diary of a D. A.*, in the recital of Frank, reads like a detective mystery yarn. Arsonists, gangsters, thieves, murderers, their escapades and gory deeds parade in its pages. All were bent upon circumventing the arm of the law and escape punishment. Much of the needed evidence to convict them eluded the police. Often the felon was hopelessly at large and search was unavailing. Assistant district attorney Frank, industrious and resourceful, probed and dug for evidence that would lead to the capture and, eventually, land the murderer in the penitentiary or in the electric chair.

There are narratives dealing with the whole gamut of police activities; stories of police informants, amateur or veteran swindlers, techniques used by the law to elicit confessions from killers, and of dedicated men and women who fought for the good of society in their blue uniforms. And there are pages in this volume on the subject of circumstantial evidence that should be made required reading for any law student or practicing attorney.

"It was my turn" reports Judge Frank "to cover felons" that week and I drove up to the 43rd precinct to question a "Lizzi" (a villain allegedly guilty of robbery and attempted rape). Thus begins a chapter entitled "Manhunt" the most thrilling crime story I have ever read. It is the embodiment of police work in the finest traditions of the craft and the seventy pages that comprise this portion of the book challenge for sustained suspense and action the best in mystery fiction.

It is the story of the pursuit and eventual capture of a rapist and murderer who preyed upon the humanitarianism and sympathy of men and women and in return for kindness, in dozens of cases, robbed and raped his victims. Upon occasion he killed. His technique, in brief, was to hitchhike rides on highways, preferably from couples, mainly in the vicinity of New York, New Jersey, or Massachusetts. Upon reaching a destination, somewhere in the city, the hitchhiker upon thanking his hosts would ask their addresses so that he could send them a card of thanks from elsewhere he was allegedly bound for. Some days later the stranger would appear at the home of his benefactors, find that the husband was out and rob and rape the housewife. More than thirty-eight such cases reached the 43rd precinct—all alike in pattern of performance and all pointing to the same villain. More than fifty like attacks were reported from other Eastern states.

The story of the hunt for the killer and his eventual apprehension is a masterful recital of relentless and skillful police work. The *Diary of a D. A.* is a rewarding volume both for the lawyer and the layman.

Correspondence

Editor, The Decalogue Journal
179 W. Washington Street
Chicago 2, Illinois.
Dear Editor:

You will recall that in the April-May 1959 issue of The Decalogue Journal, you printed an article written by me and entitled "Federal Tax Refund Suits and Partial Payments." This article dealt with the ramifications of the Supreme Court decision in the case of *Walter W. Flora vs. United States of America.* Subsequent to the printing of this article, the Supreme Court in an extremely unusual move, granted a re-hearing in this case, which had been originally decided in June 1958. The decision on the re-hearing was handed down by the Supreme Court on March 21, 1960. The majority opinion was written by Chief Justice Earl Warren. You will be pleased to know that in footnote 41 of Chief Justice Warren's opinion, he cites the article in The Decalogue Journal and quotes from it. I do not as yet have the published citation for the case, but it can be found at paragraph 60-503 in the 1960 edition of Prentice-Hall Federal Taxes.

Needless to say I am pleased by Chief Justice Warren's citation of this article and I appreciate your having published it in The Decalogue Journal last year (Volume 9, No. 3).

Very truly yours,
DONALD S. LOWITZ

MORTIMER SINGER

Member Mortimer Singer, president Lake County Bar Association, Lake County, Illinois was the guest of our Board of Managers, at a luncheon in the Covenant Club on April 15th. Mr. Singer urged the membership of our Society to attend the Illinois State Bar convention on June 22, 23 and 24 at Waukegan, Illinois.

SAMUEL L. SELTZER NOW IN FLORIDA

Member Samuel L. Seltzer, formerly president and director of the National Bank of Albany Park, Chicago, has resigned from that post to accept an appointment as president and director of the Mercantile National bank of Miami Beach, Florida.

Mr. Seltzer welcomes the opportunity of serving members of our Society in their banking and trust problems in Miami, and elsewhere in Florida.

JUSTICE ULYSSES S. SCHWARTZ HONORED

Several hundred members of the Tau Epsilon RHO Law Fraternity honored Ulysses S. Schwartz, Justice of the Appellate Court of Illinois, at a dinner on March 29th, at the Chicago Bar Association quarters, with its Public Service Award for 1960. This award has been presented annually, since 1956, to a public official elected or appointed, in recognition of outstanding public service. The occasion on March 29th also marked the fiftieth year of the guest's of honor membership in the Illinois Bar.

Commenting editorially on this event the *Chicago Sun-Times* said:

PUBLIC SERVICE AWARD FOR JUDGE SCHWARTZ

One of the most respected judges in this community is Ulysses S. Schwartz who went on the bench in 1939. Last year he won the highest score (93.29) in a poll of members of the Chicago Bar Assn. on 25 judges up for re-election.

Judge Schwartz, who has been assigned to the Appellate Court since 1951, will be honored once again Tuesday when the Chicago Graduate Chapter of Tau Epsilon Rho Law Fraternity will present its Sixth Annual Public Service Award to him.

We are happy to call special attention to this occasion because it reminds all of us that there are many good public officials in Chicago whose light is often buried under a bushel. Judge Schwartz has written some notable opinions that have broken new legal paths, but such achievements often go unnoticed in the grist of the day's news.

We join the law fraternity in its special tribute to Judge Schwartz.

PURSUIT OF CULTURE IN CHICAGO

Member Barnet Hodes, President Adult Education Council of Chicago, addressed the Cliff Dwellers Club of Chicago, 220 So. Michigan Ave., on May 4th at a luncheon, on "Pursuit of Culture in Chicago." Member Philip R. Davis presided at the meeting.

SORROW

The Decalogue Society of Lawyers announces with deep regret the death of the following member:

Samuel L. Steinberg

INSTALLMENT CONTRACTS AND REAL ESTATE

Member Mark J. Satter addressed the City Club, at a luncheon on May 2nd at the Farwell Hall, Y.M.C.A. on "Installment Contracts and Real Estate—a New Form of Exploitation." Past president Morris K. Levinson, member of the Board of Governors of the City Club, presided at the meeting.

Return Postage Guaranteed

THE DECALOGUE JOURNAL

A Publication of The Decalogue Society of Lawyers

180 WEST WASHINGTON STREET
CHICAGO 2, ILLINOIS

Non-Profit Organization
U. S. Postage
PAID
Chicago, Ill.
Permit No. 4708

A PLEA FOR CLEMENCY — HONORE DAUMIER